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## THE EUROPEAN SECURITIES AND MARKETS AUTHORITY: LIFTING THE VEIL ON THE ALLOCATION OF POWERS

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### 1. Introduction

The year 2011 has proved to be a remarkable year for European financial supervision. The beginning of the year saw the establishment of the European System of Financial Supervision (ESFS) as a response to the financial crisis and the recommendations of the de Larosière group, a group of experts set up by the Commission in 2008 in order to look into financial supervision.<sup>1</sup> As part of the establishment of the ESFS, three new European supervisory authorities (ESA) were established in the banking, securities market, and insurance and occupational pensions fields: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).<sup>2</sup> They were given greater responsibilities and tasks, and especially, they were allocated real powers to exercise their tasks. This article focuses on one of these authorities, ESMA, which replaced the Committee of European

\* School of Law, University of Manchester. I wish to thank Paul Craig, Niamh Moloney and Stephen Weatherill for their helpful comments on an earlier draft. This paper was written during my sabbatical stay at the Keio Jean Monnet Centre for EU Studies (Keio University) in 2011. I would like to thank Keio University and especially Katsuhiro Shoji for his hospitality during my stay.

1. The high-level group on financial supervision in the EU, Report (2009), available at: <ec.europa.eu/internal\_market/finances/docs/de\_larosiere\_report\_en.pdf> (last visited 10 July 2011). The EU's response to the financial crisis is examined in more detail in Moloney, "EU financial market Regulation after the global financial crisis: 'More Europe' or more risks?", 47 CML Rev. (2010), 1317–1383.

2. For first contributions on ESMA, see Fischer-Appelt, "The European securities and markets authority: The beginnings of a powerful European securities authority?", 1 *Law and Financial Markets Review* (2011), 21–32; Schammo, *EU Prospectus Law – New Perspectives on Regulatory Competition in Securities Markets* (CUP, 2011), pp. 28–54; Moloney, "The European Securities and Markets Authority and institutional design for the EU financial market – A tale of two competences: Part (1) rule-making", 12 *European Business Organization Law Review* (EBOR) (2011), 41–86; Ferran, "Understanding the new institutional architecture of EU financial market supervision" (2011), available at: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1701147> (last visited 25 July 2011); Conac, "De CESR à l'ESMA: le rubicon est franchi", (2010) *Bulletin Joly Bourse*, 500–508; Moloney, "The European Securities and Markets Authority and institutional design for the EU financial market – A tale of two competences: Part (2) rules in action", 12 EBOR (2011), 177–225.

Securities Regulators (CESR) in January 2011. Like CESR, ESMA is a collective securities actor.<sup>3</sup> Its members are national authorities. They are the voting members of the Board of Supervisors, the main decision-making organ of ESMA,<sup>4</sup> which takes its decisions by simple majority or qualified majority.<sup>5</sup> Besides the Board of Supervisors, ESMA has a full-time Chairperson and Executive Director.<sup>6</sup> A Management Board ensures *inter alia* that ESMA carries out its mission and tasks.<sup>7</sup> Its voting members are ESMA's Chairperson and six of the (voting) members of the Board of Supervisors elected to the Management Board for a finite period.<sup>8</sup>

In contrast to CESR, ESMA is meant to have "real teeth". To exercise its tasks, it was, *inter alia*, given a greater say in shaping a European single rulebook and allocated powers to take individual decisions. Moreover, it was only recently given day-to-day supervisory powers over credit rating agencies. The aim of this paper is to examine and assess ESMA's powers. It starts by noting that ESMA is not Europe's single securities authority, with a place in the Treaties next to other EU institutions. Instead, ESMA is a Union body (or agency) which was created by way of a legislative act (the "ESMA Regulation").<sup>9</sup> Crucially, ESMA was delegated certain powers. This latter fact raises some important issues which this paper attempts to investigate. Two observations are central to the line of argument that the paper seeks to develop: on the one hand, it is plain that the EU legislature has sought to manage the allocation of powers to ESMA by adopting different strategies (e.g. by laying down specific requirements which circumscribe the exercise of discretion); on the other hand, EU actors have mostly been tight-lipped over the precise constitutional limitations of a delegation of powers when allocating powers to ESMA, thereby making it more difficult for any outside observer (e.g.

3. See on CESR and ESMA as collective actors, Schammo, *op. cit. supra* note 2.

4. Art. 40(1)(b) ESMA Reg. (Reg. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), of 24 November 2010, O.J. 2010, 331/84). Besides the heads of national public authorities in charge of supervising financial actors (who are, as mentioned, voting members), the Board of Supervisors also includes a number of non-voting members, i.e., its Chairperson, a Commission representative, a representative of the European Systemic Risk Board and a representative of each of ESMA's sister agencies (the EIOPA and the EBA). See Art. 40(1) ESMA Reg.

5. Art. 44(1) ESMA Reg.

6. Arts. 48(1) and 51(1) ESMA Reg.

7. Art. 47(1) ESMA Reg.

8. Art. 45(1) and (2) ESMA Reg. The term of office for elected members is two-and-a-half years. The Executive Director and a Commission representative can also attend meetings of the Management Board (Art. 45(2) ESMA Reg). They have no voting rights, except that the Commission representative can vote on budgetary matters referred to in Art. 63 of the ESMA Reg.

9. Cited *supra* note 4.

national parliaments) to verify whether the relevant principles are satisfied.<sup>10</sup> Instead, the EU legislature has left us with the task of joining up the dots and guessing its intentions when examining the provisions vesting powers in ESMA. The argument of this article is that this state of affairs is not satisfactory and should be addressed. Specifically, the article submits that EU actors should be upfront in justifying compliance with the relevant constitutional principles governing the delegation of powers when allocating powers to ESMA, or for that matter, the ESAs. The article proceeds as follows. Section 2 begins by examining the types of powers which ESMA was vested with. Section 3 looks at the structure of ESMA's powers and in this process also discusses the case law on the delegation of powers. Section 4 highlights various issues that the EU legislature has so far failed to address satisfactorily when vesting powers in ESMA. Section 5 concludes by summarizing the findings and making a few brief suggestions for the future.

## 2. ESMA's powers

This section discusses ESMA's powers. Instead of providing a detailed and exhaustive list of powers,<sup>11</sup> it differentiates between types of powers and discusses how they testify, to different extents, to ESMA's influence in the securities field. Thus, the section begins by examining ESMA's soft law powers (2.1.), after which it turns to its preparatory rule-making powers (2.2.), its intervention powers (2.3.) and finally, its day-to-day supervisory powers (2.4.).

### 2.1. *Soft law powers*

One can be brief with respect to ESMA's soft law powers, as they do not raise particular questions for the present purposes. Article 16 of the ESMA Regulation is the main provision. It provides for ESMA to produce guidelines and recommendations, which it can address to competent authorities or market actors. By definition, these measures are not binding on their

10. The silence surrounding the questions which the delegation to ESMA raises is all the more disconcerting as EU actors have so far been unsuccessful in defining an overarching framework governing the operation of agencies. See *infra* note 110.

11. At the time of writing, negotiations over vesting ESMA with new powers are ongoing. See e.g., Commission, Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, COM(2010)484 final; Commission, Proposal for a Regulation of the European Parliament and of the Council on short selling and certain aspects of credit default swaps, COM(2010)482 final. Proposed powers are not examined here.

addressees. Having said this, the ESMA Regulation nevertheless seeks to make it more difficult for their addressees to simply ignore them. Thus, the Regulation provides that competent authorities or market actors “shall make every effort to comply...” and requires competent authorities to disclose whether they comply, or at least intend to comply, with the measures in question.<sup>12</sup> If a competent authority does not comply or does not intend to do so, it must give reasons.<sup>13</sup> ESMA must in turn publish this fact.<sup>14</sup> It might also make public the reasons given by the authority for failing to comply.<sup>15</sup> Note that market actors can also be required to report on whether they comply, provided that they are required to do so by the guideline or recommendation.<sup>16</sup> Finally, ESMA will have to identify the competent authorities which have failed to comply in its annual report.<sup>17</sup> In this context, Article 16 puts a certain onus on ESMA, as it provides that it must state how it will ensure that the competent authorities in question will follow its guidelines and recommendations in the future.<sup>18</sup>

## 2.2. *Preparatory rule-making powers*

Before examining ESMA’s preparatory rule-making powers, it is worth briefly stepping back for a moment. In 2001, one of the core questions for the Lamfalussy group, a group of experts established by the Commission, was how to improve the EU’s regulatory process in the securities field.<sup>19</sup> For the expert group, part of the answer was to rely to a greater extent on comitology decision-making. In other words, while the EU legislature would adopt legislative measures, more detail was supposed to be adopted through implementing measures.<sup>20</sup> In this process, CESR was only given a limited role: the decision establishing CESR provided for it to assist the Commission in an independent advisory capacity.<sup>21</sup> Ten years later, the picture looks

12. Art. 16(3) ESMA Reg.

13. Ibid.

14. Ibid.

15. Ibid.

16. Ibid.

17. Art. 16(4) ESMA Reg.

18. Ibid.

19. Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (Brussels, 15 Feb. 2001), available at: <[ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf)> (last visited 10 July 2011).

20. Given that implementing measures were adopted through a comitology procedure, the Commission established the European Securities Committee, a group of Member State officials chaired by the Commission, as the relevant comitology committee.

21. Arts. 1 and 2 of Commission Decision of 23 Jan. 2009 establishing the Committee of European Securities Regulators, O.J. 2009, L 25/18 (repealed).

significantly different. Following the establishment of the ESFS at the beginning of 2011 and the entry into force of the Lisbon Treaty in 2009, ESMA was given the central role in preparing so-called draft technical standards. Under the ESMA Regulation, these draft standards are meant to be adopted by the Commission, either in the form of delegated acts (regulatory technical standards or RTS) or implementing acts (implementing technical standards or ITS).<sup>22</sup> Technical standards are part of the EU's effort to create a single rule-book and are supposed to contribute to ensuring a level playing field between Member States. As the author of the draft standards, ESMA's influence over their content is utmost. Indeed, in contrast to its predecessor, ESMA's input will be direct and unmediated at the drafting stage.<sup>23</sup> Nonetheless, there is a clear boundary that the EU legislature did not cross when laying down the provisions on the RTS and ITS. ESMA can only develop *draft* standards. As already mentioned, for the standards to be binding, the European Commission is required to endorse them.<sup>24</sup> First, however, it can amend them; it can endorse them only in part or it can turn them down, as long as it complies with the requirements of the ESMA Regulation.<sup>25</sup> Whilst the Commission has thus the power of final say under Articles 10 and 15, a couple of (non-binding) recitals suggest nevertheless that the Commission will exercise its powers with some restraint. In relation to draft RTS, Recital 23 states that the draft standards should only be amended in a limited number of cases.<sup>26</sup> Meanwhile, Recital 24 records the Commission's intention to "rely, as a rule, on the draft regulatory standards submitted to it..."

The Commission has expressed some grievances about its role, and by implication, ESMA's role, under the provisions on technical standards. Besides vesting ESMA with the role of drafting the standards, the provisions of the ESMA Regulation lay down precise requirements regarding the way in which the Commission and ESMA must interact when the Commission does not just simply intend to endorse the draft standards in full (e.g., because it

22. Arts. 10 and 15 ESMA Reg.

23. To ensure the necessary stakeholder input, ESMA will be required to consult the public and the Securities and Markets Stakeholder Group, and also assess the costs and benefits which might be involved. See Arts. 10(1) and 15(1) ESMA Reg. Note that ESMA may be exempted from carrying out public consultations and cost-benefit assessments in certain circumstances (see *ibid.*).

24. The precise procedure and the role of each actor is detailed in the ESMA Reg. See Arts. 10 and 15 ESMA Reg.

25. Indeed, in specific circumstances, it can adopt technical standards without an ESMA draft. See *infra* note 27.

26. Recital 23 ESMA Reg states that "[d]raft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the *acquis* of Union financial services legislation".

wants to amend them) or, in exceptional circumstances, where it seeks to adopt technical standards without an ESMA draft.<sup>27</sup> Given these rules and ESMA's involvement in drafting the standards, the Regulation's arrangements have raised concerns as to whether they are fully compatible with the Treaty provisions on delegated and implementing acts. As a reminder, Article 290 TFEU allows the EU legislature to confer on the Commission powers to adopt delegated acts. Article 291 provides for the Commission to be vested in a legally binding act with implementing powers "[w]here uniform conditions for implementing legally binding Union acts are needed".<sup>28</sup> From the Commission's point of view, the rules on technical standards unduly affect its role. Article 290 TFEU does not, for instance, say anything about the procedure according to which the Commission is meant to adopt a delegated act.<sup>29</sup> The Commission has accordingly concluded that it enjoyed "a large measure of autonomy" with regard to the procedure for adopting delegated acts.<sup>30</sup> The Commission's misgivings about the ESMA Regulation rules on technical standards were expressed in a statement for the Council minutes made at the adoption of ESMA's text. The Commission noted that it had "serious doubts whether the restrictions on its role when adopting delegated acts and implementing measures are in line with articles 290 and 291 TFEU".<sup>31</sup> This position has received support in the literature. Chamon agrees with the Commission's assessment, noting that the provisions for the adoption of the draft standards under the ESMA Regulation are difficult to reconcile with the wording of the Treaties' articles.<sup>32</sup>

There is, however, another issue with regard to the arrangements on technical standards. It has to do with the constitutional limitations to a delegation of powers. The next sections will spend time and effort on

27. Art. 10(1), (2) and (3) and Art. 15(1), (2) and (3) ESMA Reg. See also Art. 14 ESMA Reg. Note the special requirements which apply where the Commission seeks to adopt RTS or ITS without ESMA's input. It presupposes, *inter alia*, that ESMA has failed to submit draft standards within the specified time limits (see Arts. 10(3) and 15(3) and Recital 24 ESMA Reg).

28. Art. 291(2) TFEU. In some cases, the Council can also be entrusted with the power to adopt implementing acts (see *ibid.*).

29. Commission, Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009)673 final, p. 6.

30. *Ibid.*

31. Council of the European Union, Statements, 15649/10 ADD 1, 10 Nov. 2010.

32. Chamon, "EU agencies between Meroni and Romano or the devil and the deep blue sea", 48 CML Rev. (2011), 1055–1075, 1068–1070. It is fair to say that Arts. 290 and 291 TFEU are institutionally sensitive. As far as control mechanisms are concerned, the European Parliament has, for instance, been keen to stress that Art. 290 TFEU – in particular, Art. 290(2) TFEU – did not state exhaustively the mechanisms which the EU legislature could use in order to control a delegation of powers (see European Parliament resolution of 5 May 2010 on the powers of legislative delegation, A7-0110/2010, para 2.).

examining the delegation of powers to ESMA. For reasons that will be discussed hereinafter, a delegation of decision-making powers to EU bodies such as ESMA faces important limitations. It is already worth mentioning that in order to deal with such limitations, the EU legislature might consider vesting the power to take decisions in the Commission. But such an arrangement presupposes that the Commission's power – in our case, the power to endorse draft technical standards – has real substance. There is room for argument about whether this is the case.<sup>33</sup> What seems clear at this juncture is that a legally binding requirement which would have prevented the Commission from forming its own views on the draft standards submitted to it by ESMA would have been a step too far. It would have crossed the bottom line by making the endorsement process a mere formality. It would not have been lawful.

### 2.3. *Intervention powers*

Besides its preparatory rule-making powers, ESMA possesses various intervention powers. Intervention powers allow ESMA to intervene in certain defined circumstances in the relationship between (national) competent authorities, or in the relationship between competent authorities and market actors. ESMA possesses such powers in order to settle disputes between authorities.<sup>34</sup> The ESMA Regulation makes indeed provision for ESMA to assist competent authorities in resolving their disputes.<sup>35</sup> But if competent authorities fail to settle their disagreement, it also empowers ESMA to resolve the dispute unilaterally by instructing the relevant authorities to take, or abstain from, an action in order to resolve the matter.<sup>36</sup> ESMA's decision is meant to ensure compliance with EU law.<sup>37</sup> It will be binding.<sup>38</sup> Moreover, if a competent authority refuses to comply with its decision, ESMA's intervention powers will extend to a market actor that fails to comply with directly applicable EU law requirements as a result of the behaviour of the competent authority.<sup>39</sup> Specifically, it will be entitled to address an individual

33. Cf. e.g. Chamon, op. cit. *supra* note 32, 1070, who doubts that the Commission's power of approval is in line with the Court's *Meroni* decision; Schammo, op. cit. *supra* note 2, 44 who takes a more optimistic view on the matter.

34. Art. 19 ESMA Reg.

35. Art. 19(1) and (2) ESMA Reg.

36. Art. 19(3) ESMA Reg.

37. Ibid.

38. Ibid.

39. Art. 19(4) ESMA Reg. Specifically, ESMA can take action "where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2) [of the ESMA Reg]".



decision to the market actor in question, instructing it to comply with these obligations.<sup>40</sup> ESMA has similar powers under the provisions on breaches of EU law. The ESMA Regulation empowers it to address an individual decision to a market actor whose competent authority, having been deemed not to comply with EU law, fails to act on a Commission opinion which requires it to redress this situation.<sup>41</sup> The purpose of ESMA's intervention is to ensure that the market actor in question complies with its EU law obligations, notwithstanding the failings of the competent authority.<sup>42</sup> Other intervention powers are available in the case of an emergency situation.<sup>43</sup> ESMA can, for instance, instruct competent authorities to take action.<sup>44</sup> It presupposes, however, that political leaders in the Council agree on the existence of an emergency situation and that there is a need for coordinated action.<sup>45</sup> In certain circumstances, ESMA will also be able to address an individual decision to a market actor in order to instruct it to comply with relevant (and directly applicable) EU law requirements.<sup>46</sup> The conditions that must be met in such a case are somewhat convoluted. It is presupposed, *inter alia*, that a competent authority, which ESMA has asked to take action, fails to comply with ESMA's decision.<sup>47</sup> Finally, ESMA's intervention powers also include the power to ban, or restrict, for a limited period of time "financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union",<sup>48</sup> if provision is made for this in

40. Ibid.

41. Art. 17(6) ESMA Reg. For ESMA to take action, the Regulation states that it must be necessary to address in a "timely manner" the competent authority's failure to comply with the Commission's formal opinion "in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system" (ibid.).

42. Ibid.

43. Art. 18 ESMA Reg.

44. Art. 18(3) ESMA Reg.

45. Ibid., specifically, coordination must be necessary in order to deal with "adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union" (ibid.). ESMA's decision which requires competent authorities to take action is then meant to "address any such developments..." (ibid.).

46. Art. 18(4) ESMA Reg.

47. Ibid. The Regulation states further that ESMA's intervention will only be warranted "in situations in which a competent authority does not apply the legislative acts referred to in Article 1(2), including regulatory technical standards and implementing technical standards adopted in accordance with those acts, or applies them in a way which appears to be a manifest breach of those acts, and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union" (ibid.).

48. Art. 9(5) ESMA Reg.

relevant legislative acts<sup>49</sup> or if such action is required in an emergency situation (and subject to the provisions on emergency situations of the ESMA Regulation).<sup>50</sup>

Some of the above powers proved to be controversial. The EU legislature agreed as a result to put in place additional arrangements in order to deal with cases where ESMA decides to settle a dispute between competent authorities, or where it instructs competent authorities to take action in the case of an emergency situation.<sup>51</sup> These arrangements allow the Council, if a Member State alleges that its “fiscal responsibility” is affected, to have the final say on a decision taken by ESMA against a competent authority.<sup>52</sup> But despite these safeguards, ESMA’s intervention powers are significant. They will allow it to intervene in supervisory matters; for example when instructing a competent authority to carry out a specific action in order to deal with a disagreement (e.g. in order to ensure that authorities cooperate properly with each other<sup>53</sup>) or by intervening more directly in the relationship between supervisor and supervisee, when exercising its power to issue an individual decision against a market actor.

#### 2.4. *Day-to-day supervisory powers*

The question of whether a single collective body such as ESMA should be vested with day-to-day decision-making powers over market actors (thereby replacing national competent authorities) has not been without controversy. It remains exceptional, as it derogates from one of the premises of the ESFS which is that day-to-day supervision is a matter for Member State authorities.<sup>54</sup> Supervision is generally based on the principles of home country control, which determines the authority competent to ensure supervision, and mutual recognition, which requires host State authorities to recognize the supervisory decisions of the home State authority. Supervision is not a defined term under the ESMA Regulation. It appears to be used rather loosely at EU level. It will be used hereinafter to describe the tasks of national

49. Ibid. More specifically, provision must be made for this in the legislative acts that are referred to in Art. 1(2) of the ESMA Reg.

50. Ibid.

51. Art. 38(2) and (3).

52. Ibid. For the avoidance of doubt, ESMA’s decisions are subject to judicial review. See Art. 61.

53. E.g., Art. 22(2) Directive 2003/71/EC, O.J. 2003, L 345/64 (as amended by Directive 2010/78/EU, O.J. 2010, L 331/120).

54. Recital (9) ESMA Reg.

authorities which have to do with the application of rules and regulations to particular instances (e.g. oversight, licensing or even enforcement).<sup>55</sup>

The debate on whether supervisory powers should be centralized had different stages. CESR raised the question in 2004 in relation to “trans-European market infrastructures”, without however reaching any conclusion.<sup>56</sup> In the wake of the financial crisis, proposals in favour of centralizing certain decision-making powers were put forward by the de Larosière group.<sup>57</sup> It concluded that there was a case for centralizing competences such as licensing and supervision for specific “EU-Wide institutions, such as Credit Rating Agencies and post-trading infrastructures”.<sup>58</sup> The Commission was also in favour of granting the ESAs supervisory powers over “certain entities with pan-European reach”.<sup>59</sup> Amongst Member States, the UK was keen to restrict areas of EU supervision.<sup>60</sup> But for credit rating agencies (CRAs), agreement was reached on vesting ESMA with supervisory powers.<sup>61</sup> Given that CRAs are the first type of entities which are subject to ESMA’s day-to-day supervision, the relevant rules and provisions are worth examining in more detail.

ESMA’s powers with respect to CRAs are found in Regulation 1060/2009 on credit rating agencies (CRA-R),<sup>62</sup> after it was amended by Regulation 513/2011 (CRA-AR).<sup>63</sup> Following the adoption of the latter, the CRA-R now entrusts ESMA with significant powers. Among them is the power to register EU-based CRAs.<sup>64</sup> The registration system that the Regulation establishes is

55. Cf. Wymeersch, “The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors”, 8 EBOR (2007), 237-306, 242 referring in the context of his paper to “supervision” as dealing with “applying the rules to a specific case”.

56. CESR/04-333f, p. 17.

57. The high-level group on financial supervision in the EU, Report (2009), op. cit. *supra* note 1.

58. Ibid., p. 53.

59. E.g. Communication from the Commission: European financial supervision, COM(2009)252 final, p. 11.

60. See e.g. EurActiv.com, “EU leaders back financial supervision overhaul” (19 June 2009), available at: <[www.euractiv.com/en/financial-services/eu-leaders-back-financial-supervision-overhaul/article-183341](http://www.euractiv.com/en/financial-services/eu-leaders-back-financial-supervision-overhaul/article-183341)> (last visited 15 July 2011).

61. Recital 5 ESMA Reg. The powers were enacted in the CRA-AR (see *infra* text to note 62). Negotiations in other fields are ongoing (e.g., on ESMA’s role with respect to trade repositories).

62. Regulation No 1060/2009 on credit rating agencies (CRA-R), O.J. 2009, L 302/1. The CRA-R, as originally adopted, is examined in Amtenbrink and De Haan, “Regulating credit ratings in the European Union: a critical first assessment of Regulation 1060/2009 on credit rating agencies”, 46 CML Rev. (2009), 1915-1949.

63. Regulation No 513/2011 (CRA-AR), O.J. 2011, L 145/30.

64. Arts. 14-17 CRA-R. Registration applies to CRAs which are legal persons established in the EU (Art. 14(1) CRA-R). Art. 3(1)(b) CRA-R defines a CRA as “a legal person whose

akin to a sort of licensing system, but with a particularity. Article 4(1) of the CRA-R makes registration a requirement for ratings to be used by certain market actors. Specifically, Article 4(1) states that credit institutions, investment firms, insurance undertakings, assurance undertakings, reinsurance undertakings, UCITS, institutions for occupational retirement provision and alternative investment funds may use credit ratings for “regulatory purposes” – i.e. for the purposes of complying with EU law<sup>65</sup> – only if the ratings are given by a CRA established in the EU and which is registered according to the requirements of the CRA-R.<sup>66</sup> ESMA’s powers also extend to third-country CRAs. The Regulation lays down special arrangements in order for credit ratings issued in a third-country to be used in the EU.<sup>67</sup> One such arrangement is for a third-country CRA to apply for certification.<sup>68</sup> Certification presupposes that a number of conditions are met, including that the third-country CRA is authorized/registered at home, where it must also be subject to supervision; that cooperation arrangements between ESMA and the relevant third-country authorities are operational; and that the credit ratings of the CRA and its credit rating activities are deemed systemically unimportant “to the financial stability or integrity of the financial markets of one or more Member States”.<sup>69</sup> In addition, a decision on the equivalence of the “legal and supervisory framework” of the third country must have been taken.<sup>70</sup> This decision – i.e., the decision that recognizes equivalence – is for the Commission to make.<sup>71</sup> On the other hand, the power to issue the certification decision belongs to ESMA, which will decide after being satisfied that the relevant requirements are met.<sup>72</sup>

ESMA is also in charge of making sure that the CRA-R is properly applied.<sup>73</sup> It has powers to request information and to investigate<sup>74</sup> and, if necessary, it is empowered to sanction CRAs.<sup>75</sup> Sanctioning powers include supervisory measures such as the power to revoke a registration; to stop a CRA

occupation includes the issuing of credit ratings on a professional basis”. Note that ESMA is also competent to certify third-country CRAs (see *infra* for details).

65. Art. 3(1)(g) CRA-R.

66. Art. 4(1) CRA-R.

67. Art. 4(3)-(6) and Art. 5 CRA-R.

68. Endorsement by an EU CRA of the credit rating issued outside the EU is another arrangement, but which I do not examine here. For details, see Art. 4(3)-(6) CRA-R.

69. Art. 5(1)(a), (c) and (d) CRA-R.

70. Art. 5(1)(b) CRA-R.

71. *Ibid.*, and Art. 5(6) CRA-R.

72. Art. 5(3) CRA-R.

73. Art. 21 CRA-R.

74. Arts. 23b, 23c and 23d CRA-R. Note that the CRA-R also grants ESMA the exclusive power to enter into cooperation arrangements on information exchange with third country authorities (Recital (6) CRA-R; Art. 34 CRA-R, as amended).

75. Arts. 24, 36a and 36b CRA-R.

from issuing ratings for a limited period of time; to suspend the use of ratings for regulatory purposes; to instruct a CRA to put an end to an infringement; and to make public notices.<sup>76</sup> Particularly noteworthy are the provisions which grant ESMA the power to impose fines and penalty payments.<sup>77</sup> By vesting ESMA with such a power, the CRA-AR broke new ground on the delegation of tasks to agencies. There will be more to say about these powers in the next section. For now, it is worth concluding by noting that the powers which ESMA was granted by the CRA-AR contribute importantly to placing it among the most powerful agencies in the EU. Indeed, powers which were previously in the hands of national authorities are now concentrated in the hands of a single EU body. That said, Member State authorities will continue to be involved in some way or another, for example because they are members of ESMA, or because they might have been delegated tasks by ESMA,<sup>78</sup> or because they are in charge of supervising the users of credit ratings.<sup>79</sup>

### **3. The structure of ESMA's powers**

The previous section examined the various types of powers that are vested in ESMA. This section assesses the structure of ESMA's powers. For ESMA to exercise its powers, it must have been granted such powers. The section therefore begins by examining the way in which ESMA is allocated powers (3.1.). Next, it discusses questions surrounding the delegation of powers (3.2.). Finally, it will examine various strategies which the EU legislature appears to have adopted in order to manage the allocation of powers to ESMA and thereby make it constitutionally and/or politically acceptable (3.3.).

#### *3.1. Allocation of powers*

ESMA is allocated powers in its founding Regulation. Article 1(2) of the Regulation states that ESMA "shall act within the powers conferred by [the ESMA Regulation]". Still, the manner in which the EU legislature conferred powers on ESMA is more complicated than the quoted passage of Article 1(2) appears to suggest. First, the founding Regulation does not allocate ESMA all its powers. We have already seen that it is also granted powers in sectoral

76. Art. 24(1) CRA-R.

77. Arts. 36a and 36b CRA-R.

78. Art. 30 CRA-R.

79. According to Art. 25a of the CRA-R "sectoral competent authorities shall be responsible for the supervision and enforcement of Article 4(1)...". See also Recital (9) CRA-AR.

legislation (i.e. the CRA-AR).<sup>80</sup> Second, in order to determine whether ESMA has the necessary powers to take action, it will often be necessary to have regard to sectoral acts. Indeed, according to Article 1(2), ESMA must not only act within the powers vested in it in the ESMA Regulation, but also “within the scope” of various acts (e.g. the Prospectus Directive, the Markets in Financial Instruments Directive, etc.) including subordinate measures, and “any further legally binding Union act which confers tasks on [ESMA]”.<sup>81</sup> These acts might elaborate on a given power: for instance, by specifying its scope or by determining the areas in which ESMA can exercise its powers. Thus, for ESMA to exercise its power to prepare draft RTS or ITS, sectoral acts will need to specify the areas which can be dealt with through the adoption of technical standards.<sup>82</sup> For dispute settlement, sectoral legislation will be required to define the cases which qualify for this procedure (e.g. matters which involve obligations for competent authorities to cooperate, to exchange information or to take joint decisions).<sup>83</sup> When relying on sectoral acts in order to elaborate on the powers which ESMA was given in the ESMA Regulation (instead of just allocating open-ended powers to ESMA in its founding Regulation), ESMA’s power to intervene will effectively depend on a two-stage process. Arguably, this also allows the EU legislature to control ESMA’s competences more tightly, as it progresses with its efforts to re-regulate financial markets. Note that in order to make this system work, the legislature has so far adopted one so-called “omnibus” directive whose purpose is to amend existing legislative acts.<sup>84</sup> A second directive is being negotiated at the time of writing.

80. See also Art. 8(1)(j) ESMA Reg. which provides for ESMA to “fulfil any other specific tasks set out in this Regulation or in other legislative acts”. It is worth noting that the Commission proposal on the ESMA Reg. included a provision which stated that ESMA could through sectoral legislation be entrusted with exclusive supervisory powers over certain market actors, or activities, with EU wide reach (COM(2009)503, Art. 6(3)). This provision did not, however, make it into the legally binding text of the ESMA Reg. When referring to the powers which ESMA possesses in order to “achieve” its tasks, Art. 8(2) ESMA Reg only provides (in line with Art. 1(2) ESMA Reg.), for ESMA “to have the powers set out in this Regulation...”. But at any rate, the ESMA Reg. indicates that the EU legislature did not intend for all powers to have an express legal basis in the Regulation. ESMA’s day-to-day supervisory powers over CRAs are, for instance, only foreseen in the recitals (Recital 5 ESMA Reg).

81. See also in this context Art. 1(3) ESMA Reg. which further specifies ESMA’s scope of action.

82. Arts. 10(1) and 15(1) ESMA Reg.

83. Art. 19(1) ESMA Reg.

84. Directive 2010/78/EU, O.J. 2010, L 331/120.

### 3.2. *Delegation of powers*

The assessment of ESMA's powers is also complicated by the fact that ESMA and its sister authorities, the EBA and EIOPA, are not EU institutions which exist under the Treaties and which have powers vested in them directly by the Treaties. Instead, the ESAs are EU bodies (or EU agencies) which are delegated certain powers. The question of the structure of ESMA's powers must therefore also be discussed in light of the principles governing the delegation of powers to outside bodies, especially the Court's *Meroni* judgment.<sup>85</sup> There are at least two aspects of this decision which are worthy of closer examination. The first, much cited, aspect of *Meroni* regards the delegation of discretionary powers and more specifically the Court's decision that delegating a "discretionary power, implying a wide margin of discretion"<sup>86</sup> was not permissible.<sup>87</sup> Thus, a delegation could only involve "clearly defined executive powers".<sup>88</sup> To justify its decision, the Court highlighted the fact that the delegation of discretionary powers would undermine the balance of powers "characteristic of the institutional structure of the Community".<sup>89</sup> An equally important aspect of *Meroni* was the Court's ruling that a lawful delegation presupposed that the delegator did not delegate powers which were different from its own powers.<sup>90</sup> Thus the fact that in *Meroni*, the delegates' decisions were exempted from conditions that would have applied if the powers had been exercised by the delegator, meant that the delegation in question was not permissible.<sup>91</sup> *Meroni* is admittedly not the sole case that has attracted attention. The Court's decision in *Romano* is also cited in discussions on the delegation of powers.<sup>92</sup> In *Romano*, the Court decided that a body known as the Administrative Commission of the European Communities on Social Security for Migrant Workers, could not be empowered to adopt acts "having the force of law" ("*revêtant un caractère*

85. Case 9/56, *Meroni v. High Authority*, [1958] ECR 133.

86. *Ibid.*, p. 152.

87. Specifically the Court referred to discretionary powers "implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy" (*ibid.*).

88. *Ibid.*

89. *Ibid.*, p. 152. In the Court's case law, the notion of "institutional balance" concerns the division of powers between institutions and requires each institution "to exercise its powers with due regard for the powers of the other institutions". See Case C-70/88, *European Parliament v. Council*, [1990] ECR I-2041, para 22. Note that according to Jacqu , *Meroni* was the "first genuine reference to the institutional balance". See Jacqu , "The principle of institutional balance", 41 CML Rev. (2004), 383-391, 384.

90. *Meroni*, cited *supra* note 85, para 150.

91. *Ibid.*

92. Case 98/80, *Romano v. Institut national d'assurance maladie-invalidit *, [1981] ECR 1241. For a detailed assessment of *Romano*, see Chamon, *op. cit. supra* note 32.



normative”).<sup>93</sup> Thus, according to the Court, a decision of the Administrative Commission could not be of such a nature as to require authorities to observe “certain methods or adopt certain interpretations” when applying Community legislation.<sup>94</sup>

While the Court’s ruling in *Romano* is important, it is fair to say that it has not been the main influence on discussions regarding the delegation of powers.<sup>95</sup> Indeed, it is *Meroni* which mainly continues to shape debates on the delegation of powers. This is so despite the fact that it is an old decision which concerned a Community and a Treaty (i.e. the European Coal and Steel Community (ECSC) and the Treaty establishing it) which no longer exist. There has been admittedly a debate in the academic community about the relevance of *Meroni* for the EU.<sup>96</sup> The literature has made a number of arguments against applying *Meroni* in the context of agencies. Critics have, for example, argued that it does not make sense to apply *Meroni* in the EU context which is different from its original context (i.e. the ECSC).<sup>97</sup> Some fail to see the appeal of the *Meroni* reasoning and argue that little will be lost if policy makers delegate discretionary powers in fields in which there is a clear overreaching objective, such as air safety, given that outcomes will be “close to those preferred by legislators...”.<sup>98</sup> Other critics have pointed out that, in contrast to the scenario in *Meroni*, agencies are often vested with powers which were previously in the hands of national authorities. That being so, they argue that the idea of a delegation in the *Meroni* sense is not well suited to deal with cases involving agencies.<sup>99</sup>

93. Ibid., para 20. See also Case C-102/91, *Knoch v. Bundesanstalt für Arbeit*, [1992] ECR I-04341, para 52; Case 21/87, *Borowitz v. Bundesversicherungsanstalt für Angestellte*, [1988] ECR 3715, para 19.

94. *Romano*, ibid., para 20. See also *Knoch*, ibid., para 52.

95. Chamon, op. cit. *supra* note 32, 1060.

96. E.g. Dehousse, “Misfits: EU law and the transformation of European governance” in Joerges and Dehousse (Eds.), *Good Governance in Europe’s Integrated Market* (OUP 2002), pp. 207–229; Gerardin, “The development of European regulatory agencies: What the EU should learn from American experience”, 11 CJEL (2005), 1–52; Yataganas, “Delegation of regulatory authority in the European Union”, (2001) Jean Monnet Working Paper 3/01; Schneider, “A common framework for decentralized EU agencies and the *Meroni* doctrine”, 61 *Administrative Law Review* (2009), 29–44; Chamon, “EU agencies: Does the *Meroni* doctrine make sense?”, 17 MJ (2010), 281–305; Griller and Orator, “Everything under control? The ‘way forward’ for European agencies in the footsteps of the *Meroni* doctrine”, 35 EL Rev. (2010), 3–35.

97. E.g. Gerardin, op. cit. *supra* note 96, 10.

98. Yataganas, op. cit. *supra* note 96.

99. Dehousse, op. cit. *supra* note 96, p. 221. See also Gerardin, op. cit. *supra* note 96, 10.



Yet, despite its critics, it is submitted that the Court's reasoning in *Meroni* is relevant to the EU.<sup>100</sup> Although the restrictions which it establishes with respect to the delegation of discretionary powers are as a practical matter problematic, its core messages – i.e. a delegation must involve powers which a delegator possesses and that the institutional balance of powers must be respected<sup>101</sup> – are convincing in a *sui generis* system such as the EU which is based on limited powers and in which the principle of the institutional balance is upheld by the Court of Justice and helps to keep the political ambitions of each EU institution in check. Moreover, unlike other fields such as air transport where a clear overriding objective dominates (i.e. air safety), securities regulation can have competing objectives (e.g. retail investor protection, facilitating access to markets for companies, etc.) and Member States can have very different relative preferences for these objectives. Indeed, even if Member States agree on the importance of a specific objective, they might still disagree on how to pursue it. Critics also arguably go too far when claiming that *Meroni* has nothing to offer in an EU context because agencies are often vested with powers which were previously exercised at national level.<sup>102</sup> Indeed, it might just as well be said that *Meroni* has something to offer in this context because it established that a delegator could not delegate powers which were different from its own. More fundamentally, however, the problem with vertical situations is not whether the competence was previously exercised at national level – after all, most competences were at some point exercised at Member State level – but whether the EU and its institutions have a legitimate claim to the competence in question. If yes, the competence may be attributed to the EU and the institutional balance must be respected, as otherwise one could easily bypass the principle of the institutional balance by using secondary acts to vest binding powers in agencies.<sup>103</sup>

100. The present author has taken this view elsewhere, but without elaborating on the point. See Schammo, op. cit. *supra* note 2, p. 32.

101. This is not to say that the notion of institutional balance has not continued developing in the Court's case law, starting from *Meroni*. See Jacqué, op. cit., *supra* note 89, 384. See also Lenaerts and Verhoeven, which derive from *Meroni* one of three principles of the Court's case law on the institutional balance. See Lenaerts and Verhoeven, "Institutional balance as a guarantee for EU governance" in Joerges and Dehousse, op. cit. *supra* note 96, p. 44. For a contribution that insists on a static reading of the balance-of-power notion in *Meroni*, in order to ultimately question the relevance of the decision for the EU, see Chamon, op. cit. *supra* note 96.

102. See also Schneider, op. cit. *supra* note 96, 37–38 who is not convinced by this argument either.

103. See also *ibid.*, noting that "...any form of direct implementation of EC-EU law by EC-EU agencies requires at least a virtual implementation competence of the Commission or other first-tier EU organs... Thus, one cannot circumvent the problem of institutional balance at the EC-EU level".

One can arguably also take issue with other arguments, such as, for example, that the limitations which *Meroni* places on the delegation of discretionary powers is not warranted if an agency's decisions are subject to review by a court.<sup>104</sup> For one thing, judicial intervention will not be automatic. A court's review may also be limited.<sup>105</sup> Moreover, a court's role of judicial review and the role of oversight of a delegator should be kept separate. Relying exclusively on a court would arguably mean that the court no longer just exercises its power of judicial review, but also substitutes for the role of the delegator.

This overview of different arguments is not intended to be exhaustive. It should nevertheless be sufficient to establish that unless the Court intervenes and decides to abandon its *Meroni* case law, it ought to be relevant in an EU context. Moreover, even if the Court were to abandon *Meroni*, it would still need to clarify its position on, and how its *Meroni* reasoning relates to, later decisions such as *Romano* in which the Court did not refer to *Meroni* when setting restrictions on what the Administrative Commission was entitled to do.<sup>106</sup> For now however – and even if one finds the decision impractical – *Meroni* continues to be cited by the Court,<sup>107</sup> and by political actors, as shown by the negotiations over the ESAs and their powers.<sup>108</sup> But what is increasingly unsettling is that, save for brief references to *Meroni* in

104. See Art. 263 TFEU; Art. 61 ESMA Reg.

105. See also Craig, *EU Administrative Law* (OUP, 2006), p. 186 (noting that “[t]here are...limits to the extent to which judicial review can be used to hold the content of discretionary policy choices involving the balancing of public interests accountable”).

106. See *supra* text to notes 92–94.

107. E.g. Joined Cases C-154 & 155/04, *Alliance for Natural Health*, [2005] ECR I-6451, para 90; Case C-301/02 P, *Tralli*, [2005] ECR I-4071, para 41. Although the Court refers on occasions to *Meroni*, it is nevertheless fair to say that its position regarding the limitations of the decision would greatly benefit from clarification.

108. See for references to *Meroni*, Commission, Impact assessment – accompanying document to the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, SEC(2010)678, pp. 13, 30 and 31; European Parliament (Committee on Economic and Monetary Affairs), Report on the proposal for a Regulation of the European Parliament and of the Council establishing a European Banking Authority (A7-0166/2010), p. 190; European Parliament (Committee on Economic and Monetary Affairs), Report on the proposal for a directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (A7-0163/2010), pp. 14, 217–218, 222, 253, 264; European Parliament (Committee on Economic and Monetary Affairs), Report on the proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority (A7-0169/2010), p. 134 (fn 1); European Parliament (Committee on Economic and Monetary Affairs), Report on the proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (A7-0223/2011), p. 107.

preparatory material,<sup>109</sup> the EU legislature remains tight-lipped on justifying its legislative choices in light of the relevant constitutional principles governing a delegation of powers. To be sure, the question of the constitutional limitations of a delegation was not ignored altogether in documents relating to the proposals for vesting ESMA with new powers.<sup>110</sup> In its impact assessment (IA) on the CRA-AR proposal,<sup>111</sup> the Commission referred to *Meroni* when discussing possible options for the establishment of a CRA sanctioning regime and when proposing – albeit unsuccessfully – that it should be given the power to decide on imposing sanctions. It is however apparent that the Commission did not provide any detailed assessment and in any event the assessment did not extend to powers other than the contemplated sanctioning powers. This state of affairs led the Impact Assessment Board (IAB), which evaluates and issues an opinion on the draft IAs that the Commission prepares, to express some grievances. The IAB thus asked the Commission twice to provide more details on the *Meroni* issues. In its first opinion, it noted:

“The report should give a fuller presentation of *Meroni* issues and explain why they only arise with regards to sanctioning and not other powers that might be delegated to ESMA (for instance, registration of CRAs and power of inspection).”<sup>112</sup>

In its report on the revised draft IA, the IAB still concluded that more details were needed.<sup>113</sup> What is more, the outcome of the legislative process did not provide new answers. The questions, which the IAB had raised in its opinions, remained unanswered too. Yet, discussions on the legal limitations of a delegation of powers to ESMA appear to have been conducted during the legislative process, but behind closed doors. For example, the Council Legal Service was asked to provide advice on whether ESMA could be delegated the

109. Ibid.

110. The Commission has also produced a number of documents in which it develops its views on a delegation of powers, although these reflections have taken place outside the context of legislative proposals to vest powers in agencies. See e.g. Commission, Communication from the Commission – the operating framework for the European regulatory agencies, COM(2002)718 final; Commission, Draft interinstitutional agreement on the operating framework for the European regulatory agencies, COM(2005)59 final. Note that the draft agreement was not adopted.

111. See *supra* note 108, pp. 30 and 31.

112. Commission (Impact Assessment Board), DG Markt – impact assessment on: proposal for amending Regulation 1060/2009 on credit rating agencies (26 Feb. 2010), p. 2.

113. Commission (Impact Assessment Board), DG Markt – impact assessment on: proposal for amending Regulation 1060/2009 on credit rating agencies (20 Apr. 2010), p. 2 noting *inter alia* that the report should “explain why *Meroni* concerns only arise with regards to sanctioning and not other powers that might be delegated to ESMA (for instance, registration of CRAs and power of inspection)”.

power to decide itself whether to impose sanctions on CRAs.<sup>114</sup> Indeed, similar “behind-the-doors” discussions over the permissible scope of a delegation continue being conducted as ESMA is allocated new powers. During the negotiations of the Commission proposal for a regulation on OTC derivatives, central counterparties and trade repositories, questions were thus raised with respect to whether ESMA could be delegated the power to determine whether a class of derivative contracts should be deemed eligible for a clearing obligation.<sup>115</sup> At the time of writing, negotiations are still ongoing. But the overall picture which emerges from these different negotiations is that of a process which lacks openness and of a very *ad hoc* way of determining the limits of an allocation of powers to ESMA.

The legislature’s silence is arguably all the more disconcerting for two reasons: first, because ESMA’s range of powers is considerable and growing; second, because the interpretation of the *Meroni* limitations by policy actors appears to be rather fluid. The Commission, for example, has taken the view that *Meroni* does not prevent an agency from having “technical discretion”, i.e., discretion that allows an agency to make judgments of a technical nature in the area in which it operates.<sup>116</sup> In its proposal for establishing a European Aviation Safety Agency, the Commission thus noted:

“[t]he exercise of executive powers and the control of implementation of rules and regulations is the prerogative of the Commission; such tasks

114. Public access to the advice is refused under Art. 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43. See Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1060/2009 on credit rating agencies – delegation of the power to impose sanctions to the European Securities and Markets Authority (ESMA), 23 September 2010 (No 14010/10).

115. The Council Legal Service set out its confidential views in Council Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories – delegation to ESMA of a power to decide on the eligibility for clearing of classes of derivative contracts, 20 Dec. 2010 (No 18136/10), which is only partially accessible.

116. Commission, Proposal for a Regulation of the European Parliament and of the Council on establishing common rules in the field of civil aviation and creating a European Aviation Safety Agency, COM(2000)595 final, p. 5; Commission, Communication from the Commission – the operating framework for the European regulatory agencies, COM(2002)718 final, p. 8 (speaking of areas for intervention which “must allow the agencies the margin of autonomy needed for their technical and scientific appraisals”). See also case T-187/06, *Schröder*, [2008] ECR II-3151, paras. 60–63, in which the General Court, when determining the scope of its judicial review, admitted that the Community Plant Variety Office (CPVO) benefited from a margin of appreciation with respect to complex botanical assessments, thereby transposing to the CPVO, case law on Community authorities which are required to make complex assessments of a technical or economic nature.

may be delegated to another body only on the basis of rules limiting its discretion to a technical judgment within its sphere of competence.”<sup>117</sup>

But in its impact assessment of the CRA-AR, it appears to go significantly further in attempting to carve out a discretionary space for ESMA when stating that

“clearly defined executive powers can be delegated to an agency *including powers, that involve the need to interpret Community law provisions to determine their application* and which leave the authority a certain margin of appreciation in applying these rules.” (emphasis added)<sup>118</sup>

In attempting to make sense of differences in interpretation between EU actors, a starting point is that readings are often likely to be intertwined with political or institutional preferences for or against a delegation of powers to agencies.<sup>119</sup> Setting up agencies can impact on the distribution of competences between actors and, as such, raise simple interest-based considerations for them.<sup>120</sup> The Commission thus referred to *Meroni*, and the need to respect the institutional balance, when putting forward its proposals for a CRA-AR.<sup>121</sup> As already mentioned, the Commission argued, although unsuccessfully, that it (rather than ESMA) should have the final say on fines and penalty payments.<sup>122</sup> Still, it would be mistaken to assume that within the Commission, all services and departments are necessarily equally interested in upholding *Meroni*.<sup>123</sup> As far as the Commission proposals on the ESAs are concerned, anecdotal evidence suggests that DG Markt was less in favour of *Meroni* than the Commission legal service which was among those that were committed to upholding it. Moreover, the allocation of binding powers to the

117. Ibid., p. 5.

118. Commission, cited *supra* note 108, p. 13. Cf. also with *Romano*, cited *supra* note 92, para 20.

119. See also Craig, op. cit. *supra* note 105, p. 162–164.

120. It has, e.g., been noted in the literature that the European Commission likes to embrace *Meroni* because it fits its institutional preference for regulatory agencies with limited powers, which allows it to protect its executive function (see *ibid.*).

121. Commission, Improving EU supervision of Credit Rating Agencies – frequently asked questions, 3 June 2010, available at: <europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/230&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 10 July 2011), noting that “[t]he proposal has been developed in very close co-operation with the Commission’s Legal Service in order to make sure that it fully respects existing case law and the institutional balance foreseen in the Treaty”. See also the Commission’s impact assessment on the CRA-AR proposal, cited *supra* note 108, pp. 13, 30 and 31.

122. The reading of *Meroni* that the Commission put forward would in fact have extended its powers.

123. See also Craig, op. cit. *supra* note 105, p. 162 (noting that “[i]t may well be true...that there are tensions within the Commission, with certain members wishing to move beyond *Meroni* and create true regulatory agencies” (footnote omitted)).

ESAs also raised issues among Member States and therefore in the Council. It is worth remembering that the establishment of agencies can have as a consequence to “Europeanize”<sup>124</sup> powers of national authorities. Given the ensuing loss of competence for Member States,<sup>125</sup> it is not surprising that the Council had been unwilling to delegate legally binding powers to the ESAs’ predecessors, the so-called Lamfalussy Level 3 committees.<sup>126</sup> To be sure, later, Member States had a change of heart. The establishment of the ESAs in 2011 testify to this. But agreement was not reached without first putting in place specific safeguards which are meant to protect the interests – the “fiscal responsibility” – of Member States.<sup>127</sup> *Meroni* meanwhile continues to be cited by policy actors in the context of the discussions on ESMA’s powers. The UK, for instance, appears only recently to have put forward *Meroni* in support of its position during the negotiations over the proposed regulation on short selling and certain aspects of credit default swaps.<sup>128</sup> The point is then that Member States, just as much as the Commission, have something at stake in setting up the ESAs. Also it appears that a number of strategies are used in order to deal with the delegation of powers to agencies such as ESMA. These strategies are worthy of closer examination.

### 3.3. *Ex ante and ex post strategies for managing ESMA’s powers*

When considering strategies which the EU legislature might envisage adopting in order to manage an allocation of powers to ESMA (or the ESAs generally), it is important to bear in mind that these strategies will generally reflect a mixture of considerations. Legislative choices are the outcome of a complex interplay of factors. Actor preferences and the institutional setting,

124. Dehousse, op. cit. *supra* note 96, p. 221.

125. See also Conac, op. cit. *supra* note 2, 501 (noting in relation to Member States that “[i]l existe en effet une crainte que l’intégration conduise à une perte de souveraineté définitive et potentiellement dommageable”).

126. The point was re-iterated during the 2007–2008 discussions on the Lamfalussy process; e.g., 2836th ECOFIN Meeting, 4 Dec. 2007, Press Release, No 15698/07 (Presse 270) p 20, noting that the level-3 committees should “...explore the possibilities to strengthen the national application of guidelines, recommendations and standards of Level 3 Committees, without changing their legally non-binding nature”, the Council credo with respect to Level 3 committees being that progress should be made regarding the working of these committees “...without unbalancing the current institutional structure...” (p. 17). See also Council of the European Union (ECOFIN), The EU supervisory framework and financial stability arrangements – Council conclusions, 15 May 2008 (No 8515/3/08 REV 3), pp. 3 and 4.

127. Art. 38 ESMA Reg.

128. House of Commons, European Scrutiny Committee, 20<sup>th</sup> Report 2010-11, available at: <[www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xviii/428xviii.pdf](http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xviii/428xviii.pdf)> (last visited 15 July 2011), stating at p. 6 that “the Government’s aim has been to ensure that powers given to the European Securities and Markets Authority go no further than agreed in the regulatory and supervisory package, which created, *inter alia*, the authority, and that such powers must be exercised legally in accordance with the *Meroni* principle” (footnote omitted).



including constitutional rules and case law, all matter. The latter might define strict and clear limitations that considerably constrain the choice of arrangements that policy-makers can consider adopting. But rules and case law might also be vaguer and open to interpretation, such as in the case of *Meroni*, leaving policy actors greater freedom to insist on their preferred readings. At any rate, within the permissible constitutional space, regulatory choices will be driven by all sorts of factors which might have little to do with legal considerations and more to do with making these choices politically acceptable to Member States, the Commission and the European Parliament. Bearing this in mind, it is possible to identify a number of *ex ante* and *ex post* strategies which the legislature seems so far to have adopted in order to manage the allocation of powers to ESMA.

*Ex ante* measures structure the allocation of powers. Their aim is to limit the discretion of ESMA by defining requirements or criteria according to which it must make decisions.<sup>129</sup> Arguably, these measures should meet a number of conditions in order to ensure that there is no unacceptable exercise of policy discretion. They should be clear and precise and state exhaustively the kind of factors that ESMA must consider before making a decision. Optional language (“may”, as opposed to “shall” or “must”) should be avoided. To illustrate this type of strategy, it is worth turning to the CRA-R, as recently amended by the CRA-AR. Recall that the CRA-R is the first sectoral act which vested exclusive supervisory powers in ESMA, including the power to impose financial sanctions. Based on *Meroni*, it is argued that it would not be permissible to let ESMA have a genuine discretionary say in determining a financial sanction (e.g. the amount of a fine), given that this power could be used to pursue policy choices.<sup>130</sup> It is apparent that the CRA-R seeks precisely to prevent ESMA from having an inadmissible discretionary power over fines and penalty payments.<sup>131</sup> Thus, with respect to fines, the CRA-R specifies the type of infringements that can be sanctioned, the maximum and minimum amounts of the corresponding fine (the “basic amount of the fine”), and a “two-step methodology”<sup>132</sup> for setting the final amount of the fine.<sup>133</sup> More specifically, to determine the fine, ESMA must, according to the Regulation,

129. The nature of these requirements/criteria was one of the points under investigation in *Meroni*. The Court referred to what it called “objective criteria” which contributed to ensuring that the delegation did not involve discretionary powers (see *Meroni*, cited *supra* note 85, pp. 152–154).

130. Schammo, *op. cit. supra* note 2, p. 35. There is a separate issue here which is whether the power to sanction market actors, by imposing fines for instance, is part of the powers which the EU possesses in the internal market. I will return to the point hereinafter.

131. Hereinafter, I will focus on fines. But note that with respect to penalty payments, the CRA-R also structures the delegation. See Art. 36b CRA-R for details.

132. Recital (18) CRA-AR.

133. Art. 36a, Annex III, Annex IV CRA-R.

first determine the basic amount of a fine by considering the CRA's annual turnover in the previous year and by determining whether it is lower than EUR 10 million; between EUR 10–50 million; or greater than EUR 50 million.<sup>134</sup> Based on these figures, the basic amount of the fine will be set at the lower, middle or higher end of the amounts specified for each infringement.<sup>135</sup> Next, this basic amount must be adjusted in order to take account of aggravating or mitigating circumstances.<sup>136</sup> For these purposes, the Regulation lays down specific coefficients which in each case allow ESMA to quantify the impact of these circumstances.<sup>137</sup>

The two-step methodology that the Regulation implements with respect to fines is reminiscent of the method that the Commission uses when setting fines for breaches of Articles 101 and 102 TFEU (ex 81 and 82 EC) under the Treaties' rules on competition.<sup>138</sup> Here too, the method consists in setting a basic amount to which adjustments can be made because, for example, of the existence of aggravating or mitigating factors.<sup>139</sup> But in terms of discretion, there are important differences between the Commission's powers with respect to infringements of Articles 101 and 102 TFEU and those of ESMA under the CRA-R.<sup>140</sup> The Commission's power to impose fines is structured by Council Regulation No 1/2003 which lays down a number of requirements that the Commission must respect.<sup>141</sup> But within the constraints set by the Regulation, the Commission benefits nevertheless from a "wide margin of discretion" in making use of its power to impose fines for infringements of Articles 101 and 102 TFEU.<sup>142</sup> It is relevant to note in this context that the Commission's tasks in this field include not only the duty to impose sanctions for individual breaches, but also "the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles".<sup>143</sup> Thus, in

134. Art. 36a(2) CRA-R.

135. *Ibid.*

136. Art. 36a(3) CRA-R.

137. Annex IV.

138. See esp., Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. 2006, C 210/2.

139. *Ibid.*, paras. 9–11.

140. See Wils's analysis of the Commission's discretion in antitrust enforcement in Wils, "Discretion and prioritisation in public antitrust enforcement, in particular EU antitrust enforcement" (2011), available at: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1759207> (last visited 15 July 2011).

141. O.J. 2003, L 1/1, Art. 23. Specifically, Art. 23(3) states that the Commission must have regard "both to the gravity and to the duration of the infringement" and Art. 23(2) determines a limit which the fines cannot exceed.

142. Commission Guidelines, cited *supra* note 138, para 2.

143. *Ibid.*, para 4. See also Joined Cases C-189, 202, 205 to 208 and 213/02 P, *Dansk Rørindustri and Others*, [2005] ECR I-5425, para 170.



exercising its power to fine market actors, the Commission also aims at achieving deterrence.<sup>144</sup> Moreover, unlike ESMA's methodology which was laid down by the EU legislature in a (binding) legislative act, the two-step methodology that the Commission follows when imposing fines is found in Commission guidelines. Although the adoption of these guidelines is not without effects on the Commission's discretion,<sup>145</sup> the Court has noted nonetheless that "the self-limitation on the Commission's discretion arising from the adoption of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion".<sup>146</sup> As already mentioned, in ESMA's case, the CRA-R seeks to prevent the exercise of discretionary behaviour by circumscribing tightly (in a legally binding act) ESMA's powers to set fines. Indeed, besides specifying the methodology that it must follow, various other factors contribute to this goal. For example, the language used throughout the provisions on fines: words like "may" (as opposed to "shall") or "such as" (which would enable a delegatee to have a greater degree of latitude) are markedly absent from the provisions on fining in the amended CRA-R. On the other hand, such language is common in the Commission's guidelines on setting fines.<sup>147</sup> Also, Regulation 1/2003 states that the Commission "may" impose fines.<sup>148</sup> In comparison, the CRA-R provides that ESMA "shall" impose a fine in case of an infringement.<sup>149</sup> To be sure, ESMA has still some latitude when determining the basic amount of a fine within the limits set by the legislature. But after adjusting this amount according to the requirements of the CRA-R, by reference to the annual turnover of the CRA, the latitude left to ESMA is unlikely to have, in terms of the orientations of a fining policy, any meaningful impact. Moreover, the EU legislature also added a review clause – essentially, an *ex post* measure – which grants the ECJ "unlimited jurisdiction" to review ESMA's decisions on fines

144. Commission Guidelines, cited *supra* note 138, para 4; Joined Cases 100-103/80, *Musique Diffusion française and others*, [1983] ECR 1825, para 106. See also para 30 of the guidelines which provides for the Commission to increase a fine in order to achieve deterrence (albeit within the statutory maximum set by Reg. 1/2003 (see paras. 32–33 of the Guidelines)).

145. *Dansk Rørintustri*, cited *supra* note 143, paras. 209–211, noting that general principles such as equal treatment or the protection of legitimate expectations must be respected by the Commission.

146. Case T-116/04, *Wieland-Werke AG*, [2009] ECR II-1087, para 31. See also Wills, *op. cit. supra* note 140, 20–21. See also the Editorial comments in 48 CML Rev. (2011), 1–12.

147. Commission Guidelines, cited *supra* note 138, paras. 22, 27, 28, 29, 35, 36. See also para 37 which states that the Commission may depart from the method set out in the guidelines.

148. Art. 23 Council Regulation No 1/2003. See also Wills, *op. cit. supra* note 140, 19 noting that "...the Commission is never obliged to impose fines, even if the conditions allowing it do so are fulfilled".

149. Art. 36a(1) CRA-R.

or penalty payments.<sup>150</sup> Thus, the ECJ may also “annul, reduce or increase the fine or periodic penalty payment imposed”.<sup>151</sup>

There are other ways in which an allocation of powers to ESMA is managed. ESMA might simply be prohibited from taking policy considerations into account. The provisions on RTS and ITS in the ESMA Regulation illustrate the point, as they state that the standards “shall not imply strategic decisions or policy choices...”.<sup>152</sup> Other measures might restrict or otherwise specify the scope of ESMA’s powers. As noted, the EU legislature uses sectoral acts for this purpose. For instance, for ESMA to exercise its dispute settlement powers under Article 19 of the ESMA Regulation, sectoral legislation must make provision for this.<sup>153</sup> A first so-called “omnibus” directive determined the first set of cases that qualify for dispute settlement.<sup>154</sup>

The EU legislature also relies on *ex post* measures. These measures come into play once an agency has adopted a position on a given matter. They can take different forms.<sup>155</sup> Think of the Commission’s power to approve draft RTS or ITS.<sup>156</sup> Another example is found in the Regulation establishing the European Aviation Safety Agency (EASA) which provides for the Commission, instead of the EASA, to impose fines and penalty payments following a request of the EASA.<sup>157</sup> When coming forward with its proposal for a CRA-AR, the Commission proposed to adopt a similar approach.<sup>158</sup> But, as we have seen, the EU legislature adopted a different approach by letting ESMA impose the fines and penalty payments, subject to various legislative requirements which effectively ensure that ESMA does not have an inadmissible discretionary say on the matter.

150. Art. 36e CRA-R.

151. Ibid.

152. Art. 10(1) sub-para (2), and Art. 15(1) ESMA Reg.

153. See also Recital (18) of Directive 2010/78/EU, O.J. 2010, L 331/120 which states that “[t]he regulations establishing the ESA require that the cases where the mechanism to settle disagreements between national competent authorities may be applied are to be specified in the sectoral legislation”.

154. Ibid. Under Directive 2010/78/EU, dispute settlement is envisaged for matters between competent authorities that involve cooperation, coordination or joint decision-making. Art. 22(2) of Directive 2003/71/EC (as amended by Directive 2010/78/EU) states accordingly that “[t]he competent authorities may refer to ESMA situations where a request for cooperation, in particular to exchange information, has been rejected or has not been acted upon within a reasonable time.... ESMA may, in the situations referred to in the first sentence, act in accordance with the power conferred on it under Article 19 of Regulation (EU) No 1095/2010”.

155. I have already mentioned earlier review clauses such as the one found in the CRA-R. See *supra* note 150.

156. Arts. 10 and 15 ESMA Reg.

157. O.J. 2008, L 79/1, Art. 25(1).

158. COM(2010)289 final, Arts. 36a and 36b.

#### 4. Lifting the veil on the allocation of powers to ESMA

One of the messages of this paper concerns the way in which actors at EU level allocate powers to ESMA. Specifically, it was argued that what was somewhat unsettling is that, save for the odd mention of *Meroni* in preparatory material, policy actors remained mostly silent on when and how they saw the principles governing the delegation of powers to outside bodies affect their legislative choices regarding the allocation of binding powers to ESMA. Instead, we are left with the task of joining the dots and guessing the intentions of the EU legislature when examining the relevant provisions. This section seeks to elaborate on a number of more specific issues that are currently left unaddressed. It examines five of them: the first concerns the public interest (4.1.); the second is about the nature of the powers that are delegated (4.2.); the third concerns the vexed issue of discretion (4.3.); the fourth is about the fact that the strategies which the legislature seems to adopt in order to manage the powers of ESMA can be more or less constraining and consequently affect ESMA's discretion to different extents, which raises questions about the reasons for this type of variation (4.4.); the fifth, finally, looks at the broader context when turning to the Court's decision in *ENISA* (4.5.).

##### 4.1. *Public interest*

Traditionally, the Commission has taken the view that regulatory agencies should only intervene in fields "where a single public interest predominates".<sup>159</sup> Upon reflection, however, it is not apparent that the description of agencies which act in fields "where a single public interest predominates" is especially fitting in the case of ESMA. Indeed, in a field such as securities regulation, choices regarding a particular course of action are often the outcome of a balancing exercise between different types of interests or policy considerations, e.g. investor protection or facilitating access to financial markets. This complex interplay can also be reflected in the objectives of sectoral legislation in whose implementation ESMA will participate, or in the goals of competent authorities at Member State level.<sup>160</sup> Indeed, competent authorities – i.e., the members of ESMA – can have fairly different preferences for how to pursue a particular objective (e.g. retail investor protection).<sup>161</sup> Hence, the depiction of an agency which takes

159. COM(2002)718 final, cited *supra* note 110, p. 8; Commission, European Governance: a White Paper, COM(2001)428 final, p. 24.

160. In the case of the FSA, see FSMA ss. 1(2) and 1(3) which set out the FSA's objectives and (secondary) principles of good regulation.

161. See also Schammo, *op. cit. supra* note 2, pp. 54–57. Moloney has, for instance, referred to differences which emerged during the negotiations of MiFID with regard to how

decisions in an area where a single interest prevails or – more to the point in the case of ESMA – that of an EU body with a mono-dimensional objective of “protect[ing] the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system”,<sup>162</sup> can just as well be said to obscure a far more complex reality of competing interests and considerations.

#### 4.2. *Nature of delegated powers*

One particular pressing question concerns the nature of the powers that are being allocated to ESMA. I will illustrate the point with the example of ESMA’s power to impose financial sanctions, but arguably the point is wider.<sup>163</sup> Following the adoption of the CRA-AR, ESMA now possesses exclusive supervisory powers over CRAs, including the power to impose fines and penalty payments on them. In the CRA-AR, the legislature justified the decision to grant ESMA such powers in light of the principles of subsidiarity and proportionality.<sup>164</sup> With respect to the power to impose financial sanctions, the Commission also referred in its preparatory material briefly to *Meroni* and stated how it intended to make sure that the contemplated provisions would comply with the case law.<sup>165</sup> But actors at EU level plainly ignored the question which should have preceded the enquiry into issues raised by the principle of subsidiarity: i.e. does the EU possess the powers that it seeks to delegate? The power to sanction firms or individuals in the internal market field is arguably different from other powers, in the sense that it can be seen as more closely linked to statehood.<sup>166</sup> It is generally a matter for Member States and national authorities. It is relevant to note in this context that the EU is based on the principle of conferral. It must act within the limits of the competences vested in it by the Member States in the Treaties.<sup>167</sup> Also, *Meroni* made it plain that a delegator could not delegate powers which were different from its own powers. Admittedly, there are some cases where powers to sanction individuals are vested in EU actors.<sup>168</sup> For instance, we

retail investor protection should be pursued. See Moloney, “Building a retail investment culture through law: the 2004 Markets in Financial Instruments Directive”, 6 EBOR (2005), 341-421, 348.

162. Art. 1(5) ESMA Reg.

163. See also for first thoughts on the issues at stake: Schammo, *op. cit. supra* note 2, pp. 238–239; Moloney, *Rules in action*, *op. cit. supra* note 2, 219.

164. Recital (35) CRA-AR.

165. Impact assessment, cited *supra* note 108, p. 30–31.

166. See also more generally, Dashwood, “States in the European Union”, 23 EL Rev. (1998), 201-216, 213 (noting that coercion is the “hallmark of statehood”).

167. Art. 5(2) TEU, stating further that “[c]ompetences not conferred upon the Union in the Treaties remain with the Member States”. See also Art. 13(2) TEU.

168. E.g. Art. 103(2)(a) TFEU; Art. 215(2) TFEU (with respect to “restrictive measures”).

have seen that the Commission has the power to fine and impose penalty payments in competition matters.<sup>169</sup> But these powers are foreseen in the Treaties. Furthermore, the CRA-AR is based on Article 114 of the TFEU, an internal market provision which serves a specific purpose: i.e. to adopt measures for the approximation of national rules in order to contribute to the establishment and functioning of the internal market.<sup>170</sup> Hence, the adoption of a regulation whose purpose is to vest an EU body with sanctioning/supervisory powers over CRAs is not without causing some concerns as to how it squares with basic EU constitutional principles. And yet, there are reasons to suggest that the Court is unlikely to take a narrow view on the matter. For one thing, it is clear that the Court can be inventive when interpreting the provisions of the Treaties and that “post-*Tobacco Advertising*”, it does not strike down a harmonization measure easily on the grounds that the principle of conferral is infringed.<sup>171</sup> It might well consider that the CRA-AR makes a sufficient contribution to the objectives of Article 114 TFEU.<sup>172</sup> Also, the Court has already held in relation to former Article 95 EC (114 TFEU), that the EU legislature had a discretion with respect to the method of harmonization “most appropriate for achieving the desired result” and that there was no reason to think that the addressees of the measures adopted under Article 95 EC had to be the individual Member States.<sup>173</sup> To be sure, until the Court rules, the matter will not be settled conclusively. But the relevant point for the present purposes is that the question deserves to be addressed, given that it has important implications for the division of competences between Member States and the EU. This is all the more so as subsidiarity is unlikely to present a significant hurdle for the EU legislature to vest EU bodies with supervisory/sanctioning powers over market actors. Traditionally, the Court has not policed subsidiarity vigorously.<sup>174</sup>

169. Art. 103(2)(a) TFEU.

170. In *Tobacco Advertising* the Court insisted that the harmonization measure “must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market”. See Case C-376/98, *Germany v. Parliament and Council*, [2000] ECR I-8419 [84]. See also more recently, Case C-58/08, *Vodafone*, judgment of 8 June 2010, nyr, paras. 32–33.

171. See *infra* section 4.5.

172. E.g. the Court might argue along the lines of its *ENISA* decision which is examined *infra* in section 4.5. As Fahey notes the Court’s reasoning in *ENISA* was especially broad with regard to the threshold for resorting to Art. 114 TFEU. See Fahey, “Does the emperor have financial crisis clothes? Reflections on the legal basis of the European Banking Authority”, 74 MLR (2011), 581–595, 591.

173. Case C-217/04, *United Kingdom v. European Parliament and Council*, [2006] ECR I-03771, paras. 43–44; Case C-66/04, *United Kingdom v. Parliament and Council*, [2005] ECR I-10553, para 45.

174. Lenaerts and Van Nuffel, *European Union Law*, (Sweet & Maxwell 2011), pp. 139–140; Howells and Weatherill, *Consumer Protection Law* (Ashgate, 2005) p. 133.

#### 4.3. Discretion

While there are differences between agencies, it appears that at least some of them are not prevented from exercising technical discretion, i.e. a discretion which allows agencies to make judgments of a technical nature in their field of expertise.<sup>175</sup> Given that agencies are the repositories of technical expertise, it would indeed be nonsensical to prevent them from making use of this expert knowledge. Moreover, *Meroni* was concerned with policy discretion, i.e. the exercise of discretion which allows a delegatee to pursue policy. Specifically, *Meroni* sought to rule out a delegation of powers which, because of its wide discretionary nature, could “make possible the execution of actual economic policy” (“susceptible de traduire par l’usage qui en est fait une véritable politique économique”).<sup>176</sup> In the case in point, the Court deemed this possible because of a lack of objective criteria whereby the delegates could formulate their decisions.<sup>177</sup> Yet, if we take a closer look at the above distinction, it is apparent that in practice there will be cases where it is likely to prove problematic. Its practical implementation in the fields of activities of ESMA might thus pose problems because a hard and fast distinction between different forms of discretion may not exist or because in practice the notion of technical discretion might simply serve to cast a veil over other types of considerations that ESMA cannot openly disclose because of the restrictions which are placed on the delegation.<sup>178</sup> We have yet to see how ESMA will steer

175. This appears to be the case of, for instance, the European Aviation Safety Agency (EASA), the Community Plant Variety Office (CPVO) or the Office for Harmonization in the Internal Market (OHIM). The term ‘technical discretion’ is used by the Commission (see e.g. Commission proposal COM(2000)595 final, cited *supra* 116, p. 5). In Case C-40/03 P, *Rica Foods*, [2005] ECR I-6811, paras. 45–46, A.G. Léger also spoke of “discretion of a ‘technical’ nature” (as opposed to “discretion of a ‘political’ nature”) in order to describe a form of discretion that is justified by the complexity of, *inter alia*, technical situations. More relevant in our context is the General Court’s decision in *Schröder* cited *supra* note 116, paras. 60–64 and 73, in which it admitted, when discussing the limits of its review that, an agency (the CPVO) benefited from a margin of appreciation (or a broad margin of discretion) with regard to complex technical assessments (i.e., botanical assessments). Note that there is no meaningful difference between terms such as a “margin/power of appreciation” and “discretion” in the Court’s case law. See Fritzsche, “Discretion, scope of judicial review and institutional balance in European law”, 47 CML Rev. 2010, 361–403, 364.

176. *Meroni*, cited *supra* note 85, para 152.

177. *Ibid.* para 154.

178. See also Chamon, op. cit. *supra* note 32, 1070; Craig, op. cit. *supra* note 105, p. 184 (referring to arguments developed by Giandomenico Majone when noting that “...it is not really possible in certain areas, such as risk regulation, to distinguish between the technical issues dealt with by an agency, and the policy matters residing in majoritarian institutions”); Dehousse, op. cit. *supra* note 96, p. 223 noting that “many scientific decisions do involve political dimensions” and talking about economic interests and political concerns “hid[ing] behind pseudo-scientific arguments”.

a course between these different forms of discretion – for example, when preparing draft technical standards which, according to the ESMA Regulation, “shall not imply strategic decisions or policy choices”.<sup>179</sup> At the time of writing, ESMA has yet to produce its first draft standards. But as a general comment, in a field such as securities regulation, where investor protection concerns must often be balanced against other considerations such as the cost of regulation for market actors, there is arguably scope for overlap between different forms of discretion.

#### 4.4. *Variation*

As noted above, the EU legislature appears, for legal and/or political reasons, to have used various strategies to manage an allocation of powers to ESMA. These strategies can be more or less constraining and consequently affect ESMA’s discretion to different extents. To illustrate the point, consider again ESMA’s power to impose fines. Fining can be used as a policy instrument. It is plain that ESMA’s powers were tightly circumscribed. The CRA-R (as amended) lays down a methodology and criteria on which ESMA must base its fining decisions and thereby restricts ESMA from exercising an inadmissible level of discretion. But fining is not the only instrument which can be used for policy purposes. Licensing, for instance, can be too. Recall in this context that ESMA is in charge of registering CRAs, a task which was previously vested in national authorities. Its power to register them is circumscribed.<sup>180</sup> ESMA must decide on registration solely on the basis of the requirements which are laid down in the CRA-R.<sup>181</sup> According to Article 14(5), it cannot “impose requirements regarding registration which are not provided for in this Regulation”. But in comparison to the provisions that apply with respect to fines, the CRA-R appears to structure ESMA’s registration powers more loosely. For instance, Article 14(4) does not itself specifically identify the conditions that have to be met. It merely states that the conditions are those “for the issuing of credit ratings set out in this Regulation”,<sup>182</sup> “taking into consideration” Article 4 (“Use of credit ratings”) and Article 6 (“Independence and avoidance of conflicts of interests”). For Amtenbrink and De Haan, who write before the adoption of the CRA-AR, the fact that Article 14(4) does not identify the relevant conditions explicitly is not entirely

179. Arts. 10(1) and 15(1) ESMA Reg.

180. Note that even before the CRA-AR was adopted, various requirements sought to restrict the discretion of Member State authorities (e.g. Art. 14(5) CRA-R, before amendment).

181. See Art. 14(4) and (5) CRA-R.

182. For Amtenbrink and De Haan, this suggests that the requirements of Title II (“Issuing of credit ratings”) are meant to “form the basis of the assessment”. Amtenbrink and De Haan, *op. cit. supra* note 62, 1931.



satisfactory, not least because, according to the authors, not all of the conditions that a CRA must satisfy are precise, “leaving room for interpretation and disagreement...”<sup>183</sup>

There are arguably other examples that suggest that there can be variation in terms of the extent with which ESMA’s powers are circumscribed.<sup>184</sup> Having said this, I make these points with some hesitation, as it is difficult to draw conclusions without an inside understanding of the operation of the CRA regime, and without intending to claim that any of the requirements of the CRA-R are inadequate. The point is simply that in comparison to the requirements and methodology laid down for fines, the requirements applying in relation to other types of powers lead *a priori* to a less mechanical decision-making process.<sup>185</sup>

#### 4.5. *The broader context: Relationship with other case law*

The questions that we have asked so far are important not only because of the immediate concerns that they raise, but also because governance through agencies is likely to continue developing in the EU. The Court’s permissive approach to the use of Article 114 TFEU is also likely to contribute to this trend. ESMA, just as its sister agencies, was established on the basis of Article 114 TFEU. The EU legislature claimed competence on the grounds that:

“[t]he purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Union *acquis* concerning the internal market for financial services.”<sup>186</sup>

In drawing this conclusion, without having to justify how specific tasks contributed to the approximation of laws within the meaning of Article 114 TFEU, the legislature sought to benefit from *ENISA*, a decision of the ECJ in which it took a tolerant approach to the question of the establishment of EU bodies on the basis of Article 114 TFEU (ex 95 EC).<sup>187</sup> The Court confirmed that Article 95 EC could be used for establishing a Community body which

183. Ibid.

184. See e.g. Art. 6(3) which allows ESMA to exempt a CRA from certain requirements, or Art. 24 on supervisory measures.

185. See also the comments made by the Impact Assessment Board on the Commission’s draft impact assessment accompanying its proposal for a CRA-AR (see *supra* text to notes 112 and 113). Possibly, variation has something to do with the exercise of technical discretion and/or a narrower reading of the scope of application of the *Meroni* decision.

186. Recital (17) ESMA Reg.

187. *United Kingdom v. European Parliament and Council*, cited *supra* note 173.



participates in the implementation of the harmonization process, “where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate” and provided that the tasks entrusted to such a body were “closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States”.<sup>188</sup> More specifically, it considered that the lawful application of Article 95 EC presupposed that (i) the objectives and tasks of *ENISA* were “closely linked to the subject-matter” of the Community legislation in question and (ii) its objectives and tasks “support[ed] and provid[ed] a framework for the implementation of that legislation”.<sup>189</sup> The Court’s review of this second requirement was not, however, especially vigorous.<sup>190</sup> Instead of examining *ENISA*’s tasks in detail, it pointed to the fact that the Regulation establishing *ENISA* was not an “isolated measure” but was part of a “normative context” which aimed at securing market integration in the field of electronic communications.<sup>191</sup> Moreover, the Court noted that the area in question was one in which the technology was “not only complex but also developing rapidly”.<sup>192</sup> It disagreed with the recommendations of Advocate General Kokott who, given the tasks of *ENISA*, had come to the conclusion that the “potential contributions of *ENISA*” were insufficient for its establishment to be considered a harmonization measure within the meaning of Article 95 EC.<sup>193</sup> For Kokott, this was so because it was simply not foreseeable if and in what manner the agency would participate in harmonization.<sup>194</sup> Interestingly, in reaching its conclusion, the Court also took account of the fact that *ENISA* was set up for a limited period of time and that the Regulation setting up *ENISA* included a review clause under which the Commission is required to carry out an evaluation of the agency.<sup>195</sup> In short, for the present purposes, *ENISA* was yet another decision in which the Court did not police the use of Article 114 TFEU with much vigour.<sup>196</sup> The days of *Tobacco Advertising*, in

188. *Ibid.*, paras. 44–45.

189. *Ibid.*, paras. 46–47.

190. *Ibid.*, paras. 59–67.

191. *Ibid.*, para 60.

192. *Ibid.*, para 61.

193. Opinion of the A.G., para 33.

194. *Ibid.* para 34.

195. *ENISA*, cited *supra* note 187, para 65.

196. See in this context Weatherill, “The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court’s case law has become a ‘drafting guide’”, 12 *German Law Journal* (2011), 827–864. See also Wyatt, “Community competence to regulate the internal market” in Dougan and Currie (Eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, 2009), pp. 93–136.

which the Court was willing to show more zeal, appear to have long gone.<sup>197</sup> Arguably, it also makes it more pressing to lift the veil on the delegation of powers to agencies.

## 5. Conclusion

The aim of this paper was to examine the allocation of powers to ESMA. It paid particular attention to the CRA-AR as the first sectoral act which vests day-to-day supervisory powers in ESMA. It also assessed delegation issues and the Court's decision in *Meroni*. It argued that the core messages of *Meroni* continue to be relevant for the delegation of powers to EU bodies. In the same breath, it submitted that the current state of affairs, which allows policy actors to remain tight-lipped on how they see the principles governing a delegation of powers affect the allocation of powers to ESMA, is not satisfactory and should be addressed.

Undoubtedly, the delegation of powers raises difficult legal questions under the EU's institutional setting. But the current lack of frankness is bound to raise concerns and doubts in the minds of interested parties. It risks undermining the legitimacy of ESMA's actions and ultimately makes them vulnerable to legal challenges. It is worth drawing a parallel with the Court's reasoning on the EU's policy on access to documents. When considering whether greater disclosure (in the form of the disclosure of internal Commission documents) could have detrimental effects by creating doubts about the lawfulness of a decision, the Court noted:

“[i]t is in fact... a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.”<sup>198</sup>

Moreover, for the Court, any risk that doubts might arise in the minds of EU citizens with respect to the lawfulness of an act “would more often than not fail to arise if the statement of reasons for that act were reinforced”.<sup>199</sup> It is submitted that the EU legislature should seek inspiration in this message of

197. *Germany v. Parliament and Council*, cited *supra* note 170. See for a fuller analysis, Weatherill, *op. cit. supra* note 196.

198. Case C-506/08 P, *Sweden v. MyTravel Group*, judgment of 21 July 2011, nyr, para 113; Joined Cases C-39/05 & 52/05 P, *Sweden and Turco v. Council*, [2008] ECR I-4723, para 59.

199. *MyTravel Group*, *ibid.*, para 114; *Sweden and Turco*, *ibid.*, para 60. The Court referred to the case where such risks might be thought to arise because the document disclosed is an unfavourable legal opinion.

openness when faced with difficult questions over the delegation of powers. Thus, by way of conclusion, it is submitted that EU actors should, in a spirit of good governance and better regulation, be upfront about justifying compliance with (or, as the case may be, the non-applicability of) the relevant principles and case law. Moreover, they should pay due attention to the issues discussed above: the question of the nature of the delegated powers; the issues of discretion, variation and public interest.

To improve the state of affairs, one could envisage extending to delegation issues, *inter alia*, existing arrangements which were adopted in the context of the EU's better regulation agenda, including those adopted in relation to the principles of subsidiarity and proportionality in the inter-institutional agreement on better law-making.<sup>200</sup> Seeking inspiration in subsidiarity arrangements can be partly explained by the fact that the delegation of powers to ESMA (and indeed the ESAs) has to some extent a similar sensitivity, given that the ESAs Europeanize powers which were previously in the hands of competent authorities. To be sure, this paper does not suggest that governance through agencies has no merit. Nor does it seek to participate in debates on whether ESMA will be able to exercise its powers effectively under current constitutional constraints. In fact, it takes no sides in these debates. It simply notes that any normative preference for agencies is not a reason for sidestepping essential constitutional questions during the lawmaking process. In addition, before suggesting, as some scholars do, that *Meroni* should be abandoned, more detailed consideration should be given to the implications of such a decision.<sup>201</sup>

200. See also the provisions (esp. Art 5) of Protocol (No 2) on the application of the principles of subsidiarity and proportionality which is annexed to the TEU and TFEU, O.J. 2010, C 83/206. One could imagine that, as in the case of subsidiarity and proportionality, the assessment of delegation issues be first (and systematically) carried out in the pre-legislative phase. Thus, verifying compliance could become an essential part of the Commission's impact assessment process (see also the Feb. 2010 opinion of the Impact Assessment Board on the CRA-AR proposal, (cited *supra* note 112, p. 2), noting that "...the report should regard compatibility with *Meroni* as an additional objective..."). When putting forward its proposal to grant the ESAs powers, the Commission could draw on this assessment and explain in its explanatory memorandum how they are justified in light of these principles (cf. European Parliament, Council, Commission, Interinstitutional agreement on better law-making, O.J. 2003, C 321/1, para 15 (with respect to subsidiarity and proportionality)). Any significant amendment would be duly re-assessed in this light, for instance, by way of a new impact assessment (cf. *ibid.*, para 30). At the outcome of the legislative process, the EU legislature's conclusions could materialize in a statement, which allows verifying compliance with the rules and principles governing a delegation of powers, in the recitals of the legislative text.

201. Craig, *op. cit. supra* note 105, pp. 183–190 provides a starting point. Inspiration could also be found in Menon and Weatherill, "Transnational legitimacy in a globalizing world: How the European Union rescues its states", 31 *West European Politics* (2008), 397–416.

The final words are for the EU's institutions. The European Parliament, the Council and the Commission share responsibility for better regulation.<sup>202</sup> They have committed themselves to respecting legal certainty and have agreed to encourage "simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process".<sup>203</sup> It is time for them to implement these principles in the context of the ESAs.

202. The point was also made by the European Court of Auditors in its report on impact assessments. See European Court of Auditors, "Impact assessments in the EU institutions: Do they support decision-making?" (2010), p. 6 (noting that "[b]etter Regulation is a responsibility of all EU institutions involved in the legislative process").

203. Interinstitutional agreement on better law-making, cited *supra* note 200, para 2.